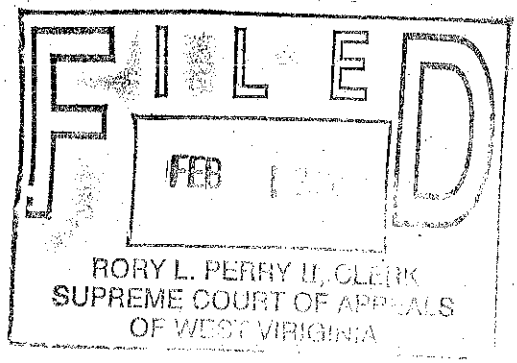
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA PHYSICIANS' MUTUAL INSURANCE COMPANY, a corporation,	:	**APPEAL NO. 33242**
Appellant,	:	
v.	:	
ROBERT J. ZALESKI, M.D.,	:	
Appellee.	:	



BRIEF ON BEHALF OF APPELLEE ROBERT J. ZALESKI, M.D.

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I. INTRODUCTION

The Appellee, Robert J. Zaleski, M.D., by counsel, James F. Companion, Yolonda G. Lambert, and Schrader, Byrd, & Companion, PLLC, submits his Brief of Appellee in rebuttal to the Appellant's Brief and the Amicus Curiae Brief of the West Virginia Insurance Commissioner, both filed on January 2, 2007. The Appellant has appealed from the Honorable Judge Arthur M. Recht's April 27, 2006 Order, which fully incorporated a preliminary Order entered on September 22, 2005. The Orders were made in the Circuit Court of Ohio County. For reasons discussed below, this Court should affirm the Circuit Court's decisions.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

By Order of September 22, 2005, the lower court entered a ruling granting partial summary judgment on Dr. Zaleski's cross motion for summary judgment finding that the Appellant, the West Virginia Physicians' Mutual Insurance Company (the "Mutual"), was a "quasi-public entity" that engaged in a "state action" when it decided not to renew Dr. Zaleski's medical malpractice liability insurance policy. In addition, the Circuit Court denied the Mutual's motion to dismiss, or in the alternative, motion for summary judgment.

This was followed by an Order of April 27, 2006, that incorporated the September 22, 2005 Order, and further determined the type of procedural due process to which Dr. Zaleski was entitled. Once the appropriate type of procedural due process was determined, the Circuit Court found that, based on the uncontested evidence, the procedural safeguards that the Mutual afforded Dr. Zaleski were inadequate and thus, granted Dr. Zaleski's request for injunctive relief, ordering the Mutual to reissue insurance to Dr. Zaleski.[1] Furthermore, the Circuit Court found that Dr. Zaleski's Complaint

[1] This insurance has never been provided to Dr. Zaleski.

sufficiently complied with Rule 8 of West Virginia's Rules of Civil Procedure; consequently, the Circuit Court properly denied the Mutual's motion to alter or amend the September 22, 2005 Order. Lastly, the Circuit Court found that the Mutual's claim that the Circuit Court lacked jurisdiction to adjudicate this case was without merit, and, accordingly, denied the Mutual's motion to dismiss for lack of subject matter jurisdiction.

As a result, the Mutual filed a Petition for Appeal of the Circuit Court's rulings which this Court granted on November 28, 2006. As stated previously, the Appellant filed its Brief on January 2, 2007, and on the same date, the West Virginia Insurance Commissioner filed an Amicus Brief alleging that the Circuit Court lacked subject matter jurisdiction and had violated West Virginia's Constitution with its rulings.

III. STATEMENT OF FACTS

In 2001, the West Virginia Legislature determined that the nation faced a "crisis in the field of medical liability insurance," W. VA. CODE § 33-20F-2(a)(1), which was "particularly acute in this State due to the small size of the insurance market." § 33-20F-2(a)(4). During the 2001 crisis, West Virginia physicians found it "increasingly difficult, if not impossible to obtain medical liability insurance because either coverage [was] unavailable or unaffordable." W. VA. CODE § 33-20F-2(a)(6). The Legislature determined that it needed to construct a solution to the problem because without action, the Legislature believed that qualified physicians may leave the State and thereby leave the citizens of West Virginia without quality health care. § 33-20-F-2(a)(7-8). Given the "substantial public interest in creating a method to provide a stable medical liability market," the State originally created programs to insure physicians through the Board of Risk and Insurance Management ("BRIM"). § 33-20F-2(a)(11-12).

BRIM's programs, however, entailed substantial liability to the State of West Virginia, so the Legislature determined that "[a] stable, financially viable insurer in the private sector [would] provide a continuing source of insurance funds to compensate victims of medical malpractice." § 33-20F-2(a)(15). To achieve this result, the State desired to transfer its liability to the private sector and to "creat[e] a stable[,] self-sufficient entity[,] which [would] be a source of liability insurance coverage for physicians . . . ." § 33-20F-2(a)(14). "[S]tate efforts to encourage and support the formation of such an entity, including providing a low-interest loan for a portion of the entity's initial capital, [was] in the clear public interest." § 33-20F-2(a)(16). Therefore, the Legislature enacted Article 20F to Chapter 33 to govern the creation of the Physicians' Mutual Insurance Company (the "Mutual") and to facilitate the "novation of the medical professional liability insurance programs" created by BRIM. § 33-20F-1(a).

The Mutual is a West Virginia, domestic, non-stock, nonprofit corporation created to provide insurance for West Virginia physicians. § 33-20F-4(a). Pursuant to § 33-20F-7(a)(b), the Mutual was initially funded by monies transferred from the West Virginia Tobacco Medical Trust Fund, in addition to a "special one-time assessment in the amount of $1,000 imposed on every physician licensed by the Board of Medicine or the Board of Osteopathy for the privilege of practicing medicine in this state." § 33-20F-7(a)(b).

Dr. Zaleski is an orthopedic surgeon who has practiced in Ohio County, West Virginia, for more than twenty-five years. (Compl., ¶1). Dr. Zaleski was previously insured by BRIM – a state-run program – for claims made during the period from December 22, 2001, through December 22, 2004. (Order Granting Partial Summ. J. to Pl., Apr. 27, 2006, ¶ 1, at 1). Dr. Zaleski's BRIM policy, along with the policies of 1,470 other West Virginia physicians, was transferred to the Mutual on

July 1, 2004. (*Id.* ¶ 2, at 1). By statute, the Mutual accepted *all* liability on the BRIM policies, but could "refuse to renew any and all . . . contracts of insurance transferred to . . . [it] from the Board of Risk and Insurance Management . . . ." § 33-20F-9(b)(1).

On September 8, 2004, the Mutual sent Dr. Zaleski a letter informing him that it would not renew his insurance policy after its December 22, 2004 termination date without stating any reason for the non-renewal. (Apr. 27, 2006 Order, ¶ 3, at 2). The Mutual also provided Dr. Zaleski a brief outline of its "Appeal Process."[2] Because no economically viable alternative existed for Dr. Zaleski to obtain medical liability insurance elsewhere in the State of West Virginia, (Mem. in Supp. of Cr.-Mot. for Summ. J., at 11 n.2.), he sent a letter to the Mutual protesting its decision. (Apr. 27, 2006 Order, ¶ 5, at 2).

The Mutual granted Dr. Zaleski an internal hearing on the basis of his protest letter; however, the Mutual advised him that "it is necessary that the process conclude within fifteen minutes." (*Id.* ¶ 6, at 2). The Mutual failed to advise Dr. Zaleski in writing of his right to have counsel present at the hearing, inspect any documentary evidence that the Mutual might have, examine witnesses and

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[2] The Mutual's "Appeal Process" informed Dr. Zaleski:

> a. Coverage is declined by underwriting.
> b. An appeal is requested by the Physician.
> c. The Physician is requested to make a brief statement to the Underwriting Committee, can ask questions of the Committee, and can entertain questions from the Committee members.
> d. The Committee reviews the application for coverage and the information gathered during the appeal and makes a decision regarding the underwriting decision immediately following the Physician's appearance before the Committee.
> e. The Physician will receive a telephone call from a representative of the Committee the day following the appeal and will receive a follow-up letter by mail.

(Apr. 27, 2006 Order, ¶ 9, at 2-3).

present relevant evidence, have subpoenas issued to compel attendance of witnesses and production of evidence, or of his right to have a stenographic record prepared of the proceeding at his own expense. (*Id.*, ¶ 10, at 3). No stenographic record exists of the hearing. (*Id.* ¶ 11, at 3).

On November 11, 2004, Dr. Zaleski attended the brief hearing before the Mutual's underwriting committee in Charleston, West Virginia. (Apr. 27, 2006 Order, ¶ 11, at 3). One day after the hearing, he was informed by telephone that the decision not to renew his insurance was affirmed. (*Id.* ¶ 20, at 5). By its own admission, the Mutual's decision not to renew Dr. Zaleski's insurance policy was "rare." (Pet. for App. at 3). The Underwriting Committee never provided Dr. Zaleski with any notice of a right to appeal its decision. (Apr. 27, 2006 Order, ¶¶ 21, 27, at 5-6).

Angry over the summary nature of the Mutual's decision, Dr. Zaleski sent a letter to the Mutual requesting a detailed explanation for its decision. (*Id.* ¶ 22, at 5). The Mutual never responded in writing to that letter. (*Id.*). Accordingly, on December 8, 2004, Dr. Zaleski wrote to the West Virginia Insurance Commissioner advising her of his situation. (*Id.* ¶ 23, at 6). The Insurance Commissioner promptly directed the Mutual to respond to Dr. Zaleski's letter. (*Id.* ¶ 24, at 6). On December 15, 2004, the Mutual sent the Insurance Commissioner a letter stating its reason for not renewing Dr. Zaleski's policy as the "frequency of lawsuits in his history." (*Id.* ¶ 22, at 5). Later, after this lawsuit was filed, the Mutual said that the reasons for non-renewal were Dr. Zaleski's prior claims history and "prior alcohol and/or chemical dependency," (*Id.*), – a problem that Dr. Zaleski had overcome in the early 1980s. (Pl.'s Resp. to Def.'s Mot. to Dismiss or Mot. for Summ. J., at 8).

The Mutual made its decision to not renew Dr. Zaleski's insurance policy without regard to his *current* loss experience. (*See* Mem. of Op. and Order, Sept. 22, 2005, at 8) ("The record does

not demonstrate any current loss experience or current lack of professional training or capability [of Dr. Zaleski] . . . ."). The Underwriting Appeals Committee should have been aware that twelve of the nineteen claims filed against Dr. Zaleski occurred prior to 1995, and of the remaining seven filed after 1995, *five* were dismissed or closed without paying any indemnity. (Apr. 27, 2006 Order, ¶ 13, at 4). Therefore, at the time of the appeal hearing, only three cases existed which might have been at issue – one settled for $10,000, one was pending at the time of the hearing, and a third was a notice of new malpractice claim that had been filed on August 24, 2004. (*Id.*). Since no screening certificate of merit was filed on behalf of this patient within the required 60 days, which expired *before* the hearing on November 11, 2004, (*id.*), it is Dr. Zaleski's position that it should not have been considered by the Mutual. (Pl.'s Resp. to Def.'s Mot. to Dismiss or Mot. for Summ. J., at 8-9).

After receiving the letter from the Mutual, the Insurance Commissioner forwarded a copy to Dr. Zaleski and explained: "[I]t does not appear that the West Virginia Physicians' Mutual has violated any applicable statute or rule. Therefore, no administrative action against the company. . . appears to be appropriate at this time." (Mem. In Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 4, ex. 7). Dr. Zaleski was never advised that the Commissioner's letter was a final order (indeed, it was not an order at all), or that he had any further right to appeal. (Apr. 27, 2006 Order, ¶¶ 21, 27, at 5-6).[3] Consequently, Dr. Zaleski filed suit on April 4, 2005, against the

[3]In the interim, Dr. Zaleski accepted an offer of employment by Wheeling Hospital so that he could obtain malpractice coverage through its insurer, although he reimbursed the hospital for the premium. The Mutual inappropriately interjected the issue of damages in its brief by claiming that Dr. Zaleski's income actually increased the year he was employed by Wheeling Hospital. The Mutual neglected to mention that Dr. Zaleski was required to pay $177,661.48 in tail coverage when the Mutual terminated his coverage, the additional cost in amount of insurance premiums he incurred and loans he personally had to make to his practice, all of which exceeded $200,000.00 and is expected to increase.

Mutual in the Circuit Court of Ohio County asserting causes of action for, inter alia, arbitrary and capricious conduct in depriving Dr. Zaleski of his medical malpractice insurance policy. (*See* Compl.) (alleging four counts where the Mutual's conduct injured Dr. Zaleski and praying for compensatory and punitive damages and any other relief that the Circuit Court deemed appropriate).

On June 1, 2005, the Mutual filed its motion to dismiss the Complaint on the grounds that it did not have any duty to renew Dr. Zaleski's insurance policy, and specifically alleged that even if its decision to not renew his policy was done in an arbitrary and capricious manner, "West Virginia law does not recognize an independent cause of action for arbitrary and capricious conduct on behalf of private entities." (Mem. in Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 12). On August 5, 2005, the lower court held a hearing on the Mutual's motion. The Circuit Court determined that the Mutual's status as a private, public, or quasi-public entity was a question of law that had to be determined before any other issues could be considered. (Tr. of Aug. 5, 2005 Hr'g, at 5). Therefore, the Circuit Court did not specifically address the merits of Dr. Zaleski's individual causes of action. (*See id.)* (concluding that it was improper to try other issues of the case without first determining whether the Mutual is a private or public entity).

Dr. Zaleski filed a cross-motion for summary judgment on September 6, 2005, asking the Circuit Court to determine that the Mutual was required to renew Dr. Zaleski's professional liability insurance, and/or to find that the Mutual is a quasi-public agency that must provide Dr. Zaleski with procedural due process before effectively terminating his right to privately practice medicine. (*See* Cr.-Mot. and Mem. in Supp. of Cr.-Mot. for Summ. J.) (moving the Circuit Court to make these determinations). The Circuit Court determined that West Virginia Code § 33-20F-2 clearly establishes the dynamic of a "State Action" and the "various provisions of the Physicians' Mutual

Insurance Act clearly establish a close nexus between the State of West Virginia and. . .[the Mutual], by which the goals of the State of West Virginia to protect the health, safety[,] and welfare of its citizens are 'pervasively entwined' with the means of implementing those goals through a private insurance entity, without subjecting the State of West Virginia to substantial[,] actual[,] and potential liability." (Mem. of Op. and Order, Sept. 22, 2005). Thus, on September 22, 2005, Judge Recht denied the Mutual's motion to dismiss and granted Dr. Zaleski's cross-motion for summary judgment on the issue that the Mutual was a "quasi-public entity" and found that its decision not to renew Dr. Zaleski's insurance policy was a state action inasmuch as it had accepted BRIM's liability on Dr. Zaleski's insurance policy. The lower court also ordered the Mutual to submit a procedure for affording a non-renewed policy holder the right to contest that decision. (Dec. 14, 2005 Order Regarding Hr'g of Nov. 15, 2005, at 2).

On November 15, 2005, the Circuit Court held a hearing to determine "the issue of boundaries of the due process hearing mechanism." (Mem. of Op. and Order, Sept. 22, 2005, at 9). Further hearings were held on February 3, 2006, and again on February 20, 2006. (Apr. 27, 2006 Order, at 1). The Circuit Court determined that because the Mutual is a "quasi-public entity," (*id.* ¶ 2, at 6), the applicable due process that the Mutual should have afforded Dr. Zaleski was that process already used by the Insurance Commissioner, as outlined in W. VA. CODE § 33-2-13. (*Id.* ¶ 4 at 7). The Circuit Court further found that the procedural safeguards the Mutual afforded Dr. Zaleski failed to comply with this standard and were insufficient for due process purposes. (*Id.* ¶ F, at 9). Specifically, the Circuit Court found, "the procedural safeguards provided to Dr. Zaleski were shallow, at best, and a sham, at worst," (*Id.*), and ordered the Mutual to reinstate its insurance coverage of Dr. Zaleski as of the date of the order. (*Id.* at 10).

At the hearing on November 15, 2005, which was scheduled to address the "Boundaries of Due Process Hearing Mechanism," counsel for the Appellant asserted that the appeal process that was available to Dr. Zaleski had not yet been fully developed. (Tr. of Nov. 15, 2005 Hr'g, at14-15). Therefore Judge Recht requested the parties to provide stipulated facts as to what occurred with regard to Dr. Zaleski's appeal of the decision not to renew his insurance. As Judge Recht stated, if he considered the review appropriate, "then the case is over." (*Id.* at 15). Areas of dispute could be developed by way of affidavit or deposition, but the goal was for the judge to be able to determine the due process, if any, to which Dr. Zaleski was entitled and what he received. (*Id.*).

The parties exchanged stipulated facts on December 30, 2005. On January 11, 2006, counsel for Dr. Zaleski provided "Zaleski's Response to Defendant's Proposed Stipulations, with Comments and Suggestions" to Mutual's counsel. On January 16, 2006, pursuant to the Court's Order of December 14, 2005, the Mutual submitted its "Proposed Mechanism for Review of Appeal of Decision not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest." At a hearing on February 20, 2006, the parties reviewed the proposed stipulations with the judge in an effort to determine those upon which accord existed. This was followed by an Order Granting Partial Summary Judgment entered on April 27, 2006, which incorporated those facts discussed at the February 20, 2006 hearing, and which the parties did not dispute. At no time did the Appellant offer any depositions or affidavits regarding disputed facts.

IV. REBUTTAL OF APPELLANT'S ASSIGNMENTS OF ERROR

The Mutual makes five purported "assignments of error" to the Circuit Court's decision, the rebuttal of which is addressed; however, it is not necessary to address each of them because the

fundamental holding of the lower court was that the substance of the Complaint could not be considered until the issue of whether the Mutual was a public or private entity had been determined:

1. The Ohio County Circuit Court had subject matter jurisdiction because the Insurance Commissioner did not treat Dr. Zaleski's letter protesting the Mutual's action as a formal complaint, the Commissioner never issued an order, and Dr. Zaleski was never informed of his right to appeal.

2. The Ohio County Circuit Court properly denied the Mutual's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment because a clear controversy exists and Dr. Zaleski stated claims upon which remedies can be granted.

3. The Ohio County Circuit Court properly denied the Mutual's motion to have the judgment set aside because the Complaint sufficiently placed the Mutual on notice of a due process claim and alerted the Mutual to the possibilities of equitable relief.

4. The Ohio County Circuit Court properly granted Dr. Zaleski partial summary judgment and injunctive relief without conducting further evidentiary hearings insofar as the Circuit Court did so based upon uncontested, stipulated facts.

5. The Ohio County Circuit Court properly granted Dr. Zaleski's Cross-Motion for Summary Judgment because it correctly found the Mutual to be a "quasi-public entity" that owed Dr. Zaleski procedural due process before terminating his medical malpractice policy, and the Circuit Court properly determined that the Mutual's existing appeal procedure was inadequate.

V. STANDARD OF REVIEW

The Mutual correctly summarized the standard of review as *de novo* when considering a lower court's *granting* of either a motion to dismiss, or motion for summary judgment – or as in this case, the granting of partial summary judgment. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). Discovery has occurred with respect to the issue of whether the Mutual is a "quasi-public" entity and, consequently, whether it owed Dr. Zaleski procedural due process when it failed to renew his medical malpractice insurance policy. Discovery also has occurred with respect to the nature of procedural safeguards the Mutual provided Dr.

Zaleski. Thus, the Mutual's appeal of the Circuit Court's *granting* of Dr. Zaleski's cross motion for summary judgment on these issues is ripe for consideration.

The Mutual's appeal, however, of the Circuit Court's *denial* of its motion to dismiss, or in the alternative, motion for summary judgment is not proper because discovery has yet to occur on these issues. *See Wilfong v. Wilfong*, 156 W. Va. 754, 197 S.E.2d 96 (1973) (holding that denials of motions for summary judgment and judgment on the pleadings are non-appealable at the time of the rulings). Likewise, the Circuit Court has not made any determinations as to damages alleged within the Complaint. (*See* Apr. 27, 2006 Order, at 7) (" A jury trial shall be held regarding the issue of damages sustained by the plaintiff, if any, as a result of the non-renewal of his insurance after discovery has been completed on that issue."). Thus, because discovery has not been completed with respect to damages and other issues contained within the Mutual's motion to dismiss, or in the alternative, motion for summary judgment, the Mutual's appeal of these items is premature.

VI. ARGUMENT

The Circuit Court properly found that the Mutual is a quasi-public entity that owes Dr. Zaleski greater procedural safeguards than a private insurer would when determining whether or not to renew an insured's policy.[4] Moreover, the Circuit Court accurately found that the procedural safeguards that the Mutual afforded Dr. Zaleski were a "sham;" and therefore granted Dr. Zaleski's request for injunctive relief, where Dr. Zaleski specifically moved the court to order the Mutual to renew Dr. Zaleski's professional insurance in his cross-motion for summary judgment. No

[4]On several occasions, this Court has described insurance companies as "quasi-public" in character. *See Barefield v. DPIC Companies, Inc.*, 215 W. Va. 544, 554, 600 S.E.2d 256 (2004) ("The insurance business is *quasi-public* in its character, and the state may, under its police power, . . . prescribe the terms and conditions on which it may be conducted and generally to regulate it and all persons engaged in it.") (emphasis added) (quoting, *Swearingen v. Bond*, 96 W. Va. 193, 197, 122 S.E. 539, 540 (1924)).

additional evidentiary hearing was required for this relief because full discovery had occurred on the Mutual's status as a quasi-public entity and the lack of procedural safeguards accorded Dr. Zaleski. In other words, the Circuit Court possessed a record of uncontested facts that supported this determination. This result was not strained, and in no way violated West Virginia's Constitution.

Moreover, the Circuit Court correctly found that the Mutual's contention that the Court lacked subject matter jurisdiction was without merit and properly denied the Mutual's motion to dismiss on that point. Furthermore, despite the Mutual's contrary contention, requiring that a quasi-public entity afford private citizens procedural safeguards and that it refrain from acting in an arbitrary and capricious manner when failing to renew professional insurance to a physician, unless it can provide a rational basis for non-renewal, is neither an unjust nor bizarre result.

Further, despite the Mutual's contention, the Circuit Court's decision, if upheld, will not cause any "catastrophic effect" or competitive disadvantage. Importantly, the Mutual has conceded that such refusals to renew "*are rare*," so it is difficult to understand how implementing due process could put it at an economic disadvantage. Moreover, the Legislature has already ensured that a competitive disadvantage exists – that is, for other insurers, not the Mutual. Indeed, the Legislature has empowered the Insurance Commissioner to waive the Mutual's premium taxes if payment would financially impair it. This ability to waive the Mutual's taxes exists as long as the low interest loan that the State provided the Mutual for start-up capital from State funds is outstanding. Accordingly, the Mutual would not suffer catastrophic, competitive disadvantages were it to provide procedural safeguards to its insureds.

A. The Circuit Court Properly Denied the Appellant's Motion to Dismiss and Had Authority to Do Such Because the Court Had Subject Matter Jurisdiction over this Case.

The Mutual argues that Dr. Zaleski filed a formal complaint with the West Virginia Insurance Commissioner and that he filed his Complaint in Circuit Court without first exhausting his administrative remedies; thus, the Mutual contends, the Circuit Court lacked subject matter jurisdiction over Dr. Zaleski's lawsuit. Additionally, the West Virginia Insurance Commissioner ("Insurance Commissioner") has filed an Amicus Brief arguing that the Circuit Court lacked jurisdiction over Dr. Zaleski's Complaint because he purportedly failed to exhaust his administrative remedies, and concomitantly, that the Circuit Court erred in exercising jurisdiction in an alleged violation of Article V, § 1 of the West Virginia Constitution.

Both the Mutual's and the Insurance Commissioner's arguments presuppose that Dr. Zaleski initiated administrative remedies by filing a formal complaint with the Insurance Commissioner, and that the Insurance Commissioner issued an order on the formal complaint – neither of which occurred in this case. Moreover, while the subject matter jurisdiction of a court to act may be raised at any time, the Mutual's arguments are not well taken because the Mutual never seriously argued in the Circuit Court that it lacked subject matter jurisdiction.

1. Dr. Zaleksi Never Invoked Any Administrative Remedies with the Commissioner.

The appellant's entire argument is premised upon whether Dr. Zaleski's letter to the Insurance Commissioner invoked an administrative remedy which would preclude him from seeking access to the Circuit Court of Ohio County. It clearly did not. When Dr. Zaleski received the Mutual's

September 8, 2004 letter informing him that the Mutual would not renew his policy of insurance, Dr. Zaleski was not represented by counsel. The Mutual's letter stated in part as follows:

> In accordance with 33-20C-4, Code of West Virginia, you are hereby notified that the above referenced policy will expire at 12:01 a.m. on December 22, 2004, and will not be renewed.

(Mem. in Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 3, ex. 3).

Dr. Zaleski responded to that letter on September 23, 2004, *pro se*, requesting that the Mutual itself – not the Insurance Commissioner – reconsider its decision and agree to renew his insurance policy. On November 11, 2004, the Mutual conducted a brief hearing.[5] The following day, the Mutual informed Dr. Zaleski – by telephone – that it would not grant his appeal and would not reconsider its decision to terminate his insurance policy. The Mutual then sent a letter to Dr. Zaleski that merely reiterated its denial without explaining the basis for its decision. Dr. Zaleski was not provided with any written notice of a right to appeal this decision.

As a result, Dr. Zaleski wrote a letter to Scott Atkins, the Underwriting Supervisor of the Mutual, requesting a detailed explanation for its failure to renew his malpractice policy. When the Mutual failed to timely provide him with a written explanation of its decision, as he had requested, Dr. Zaleski wrote to the Insurance Commissioner on December 8, 2004. Dr. Zaleski's letter to the Commissioner was dated a mere fourteen days before his insurance policy was to expire and stated in part as follows:

> This letter is written to make a formal complaint regarding my nonrenewal of malpractice coverage starting December 23rd of this year. The only available insurance company at present is the Physicians Mutual Insurance Company . . . . The reason provided for my nonrenewal . . . was "frequency of suits." This is the very

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[5]Dr. Zaleski was advised in advance by the Mutual that the hearing would be limited to fifteen minutes. (*See* Apr. 27, 2006 Order, ¶6 at 2).

essence of why the new insurance company was formed and why all other malpractice carriers have left the market in this state.

[Dr. Zaleski states that the allegation of "frequency of suits" is unfounded and accuses the Mutual of being unfair and acting with bias.]

As a life long resident of this state and a physician providing excellent orthopedic surgical care to all my patients, I feel that I should be provided malpractice coverage by this state subsidized by Physician Mutual Company.

(Mem. in Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 4, ex. 6).

Based on Dr. Zaleski's letter to the Insurance Commissioner, the Commissioner sent a letter to the Mutual, "requesting" a written response. On December 15, 2004, the Mutual sent a letter in response to the Insurance Commissioner stating that the "frequency of lawsuits" against Dr. Zaleski made him an "unacceptable risk;" thus, the Mutual decided not to renew his insurance policy. In turn, the Commissioner wrote a letter to Dr. Zaleski on December 16, 2004, stating that it did not "appear" that the Mutual had violated any statute or rule and that no administrative action would be undertaken by the Commissioner "at this time." (*Id.* at 4, ex. 7).

Dr. Zaleski's purpose in writing to the Insurance Commissioner, however, was not to initiate a formal complaint process – he later hired counsel for that purpose. Dr. Zaleski was attempting to advise the Commissioner that the Mutual was being unfair for not renewing his insurance.

Likewise, the Insurance Commissioner did not treat Dr. Zaleski's letter as a formal complaint and never entered any order concerning the "complaint." The Commissioner wrote a "letter" to Dr. Zaleski – she did not issue an "order." The letter states:

After carefully reviewing Mr. Rader's response and attachments, it does not appear that the West Virginia Physicians' Mutual has violated any applicable statute or rule. Therefore, no administrative action against the company on the basis of your written complaint and Mr. Rader's response appears to be appropriate at this time.

Please feel free to contact me to discuss this further.

(Mem. in Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 4, ex. 7). The Commissioner's letter does not even comment on Dr. Zaleski's claim that the Mutual was treating him unfairly.

As is plain from the language used in the letter, no indication exists that the Commissioner made a final determination on whether or not the Mutual had violated a statute or rule (there was merely the "appearance" that no statute or rule was violated), and the Commissioner left open the possibility that she may pursue administrative action against the Mutual in the future ("no administrative action . . . appears to be appropriate at this time."). Nothing in the Commissioner's letter of December 16, 2004, states that Dr. Zaleski would or would not be entitled to a hearing. *See* W. VA. CODE § 33-2-14 (requiring as a precondition to judicial review, that the commissioner enter an order "after a hearing" or that the commissioner enter "an order refusing a hearing.").

Indeed, any insured aggrieved by the cancellation of a policy of malpractice insurance has the right to request a hearing before the Commissioner. W. VA. CODE § 33-20C-5. That hearing "*shall*" be conducted in accordance with the procedures outlined in W. VA. CODE § 33-2-13. In turn, § 33-2-13 requires the Commissioner to "enter an order containing his findings of fact and conclusions upon the subject matter [by]. . . affirm[ing], modify[ing] or nullify[ing] action theretofore taken. . . ." *See also* W. VA. CODE ST. R. § 114-14-3.3 (requiring the Commissioner to enter an order and reasons for that order). There is no similar statutory remedy for the nonrenewal of a malpractice insurance contract.

The Commissioner's "letter"of December 16, 2004, is not cast as an "order," and it does not affirm, modify, or nullify the actions taken by the Mutual – the letter leaves open the possibility that

the Commissioner may take future action. *See, e.g.*, 5 U.S.C. § 551(6) (defining a "final order" as one that makes a final disposition of a matter, in whole or in part); *International Tel. & Tel. Corp., Communications Equip. & Sys. Div. v. Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 443-48 (1975) (holding that an "order" requires a disposition having some determinate consequences for a party to the proceedings; *investigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing elements of a final disposition as required by the definition of "order" do not constitute final adjudication*); *Southern Cal. Aerial Advertisers' Ass'n. v. Fed. Aviation Admin.*, 881 F.2d 672, 675-76 (9th Cir. 1989) (finding a letter to be a final order when it plainly precluded a party from engaging in certain actions); *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974) ("An agency's decision to refrain from an investigation or an enforcement action is generally unreviewable."); *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 100, 529 S.E.2d 110 (2000) ("In the absence of such a properly entered final order, the Circuit Court of Kanawha County was without jurisdiction to consider an appeal of this case."); 4 *Administrative Law* § 36.02 (2006) ("*Inaction by an agency will ordinarily not constitute a final disposition*.") (emphasis added).

Lastly, the Insurance Commissioner failed to provide Dr. Zaleski with any written notice of a right to appeal her decision to not take action against the Mutual at that time, further evidencing that she did not perceive (at the time) Dr. Zaleski's letter as a formal complaint sufficient to trigger administrative proceedings. If the Commissioner would have deemed Dr. Zaleski's letter to be a formal complaint, then the Commissioner would have – at a minimum – entered an order affirmatively granting or denying relief to Dr. Zaleski *and* advised him of a right to a hearing on the issue. Because no administrative proceeding was initiated by Dr. Zaleski with the Insurance Commissioner, the Circuit Court has subject matter jurisdiction over Dr. Zaleski's lawsuit. *See FMC*

Corp. v. W. Va. Human Rights Comm'n, 184 W. Va. 712, 718, 403 S.E.2d 729 (1991) (stating that a plaintiff may, as an alternative to pursuing administrative remedies, file a civil action directly in the circuit court). Thus, the Ohio County Circuit Court had subject matter jurisdiction to adjudicate this case and properly found the Mutual's contention to the contrary to be meritless.

With respect to the Mutual's argument that the Circuit Court lacked subject matter jurisdiction, it should be noted that the Mutual never filed a formal "Motion to Dismiss for Lack of Subject Matter Jurisdiction." The issue of the lower court's lack of subject matter jurisdiction was raised in one sentence of the "Proposed Mechanism for Review and Appeal of Decisions Not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest" which stated, "[i]n other words, the facts of this case suggest that Dr. Zaleski had and failed to exercise all the due process rights that he claims he is 'entitled' to receive." (*Id.* at 3-4). In fact, the issue of the "appeal" to the Insurance Commissioner was not initially raised to contest subject matter jurisdiction, but instead was used to support the Mutual's claim that "due process" was afforded to Dr. Zaleski.

Even though the Mutual never advised Dr. Zaleski that a further review was available to him following the appeal hearing, it attempted to persuade the Circuit Court that it had provided Dr. Zaleski with sufficient due process by claiming that Dr. Zaleski *could* have pursued an administrative appeal as set forth in W. VA. CODE §§ 33-2-13 and 14. *(Id.)*. The fact that the Appellant merely "suggested" the lack of subject matter jurisdiction is shown by the Appellant's reservation of right "to file a motion for summary judgment on the issue of res judicata or collateral estoppel based on the decision of the Insurance Commissioner." (*Id.* at 4, n.3). Dr. Zaleski contended that this secret right of appeal, if in fact it existed at all, did not provide adequate due process. At the hearing of

February 3, 2006, counsel for the Appellant mentioned that "that's one of our arguments, that basically there's no jurisdiction at this Court at this point in time." (Tr. of Feb. 3, 2006 H'rg at 8.) Judge Recht responded that, "[t]he point is that the insurance company didn't in anyway feel that there was a due process requirement. And now you turn it around and say that he should be penalized for something they didn't think existed in the first place." (*Id.* 8-9).

2. The Circuit Court Did Not Violate the West Virginia Constitution.

The Insurance Commissioner argues that the Circuit Court violated the West Virginia Constitution by mandating that the Mutual "step in the shoes" of the Insurance Commissioner, and by allowing Dr. Zaleski to appeal the Mutual's non-renewal decision to the Circuit Court.

The Insurance Commissioner misunderstands the nature of this case. The Circuit Court never ordered that the Mutual "step into the shoes" of the Insurance Commissioner; rather, the Circuit Court determined that the Mutual was a quasi-public entity, and as such, owed Dr. Zaleski due process of law. The Circuit Court held a special hearing on the parties' "Proposed Mechanism for Review and Appeal of Decision Not to Renew Insurance Policies." The Circuit Court never attempted to confer on the Mutual the rights, powers or duties of the Insurance Commissioner. Moreover, Dr. Zaleski has a right to appeal directly to the Circuit Court of Ohio County because he never invoked his administrative remedies.[6] *FMC Corp., supra.*

[6]The Insurance Commissioner is mistaken in believing that the Circuit Court's Order found that because the Mutual was a quasi-public entity, the Commissioner no longer "has jurisdiction over the Mutual with regard to the non-renewal of insurance policies," (Amicus Curiae Br. of W. Va. Ins. Comm'r, at 1); the Order does not strip jurisdiction from the Commissioner to hear cases against the Mutual when the insured opts to pursue administrative remedies rather than to litigate in the circuit courts.

B. The Circuit Court Properly Denied the Appellant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

The Mutual argues that Dr. Zaleski's claims against it should be dismissed on the grounds that: (1) Dr. Zaleski's claims for breach of the covenant of good faith and fair dealing should have been dismissed because no underlying contract exists; (2) West Virginia does not recognize a claim for arbitrary and capricious conduct on behalf of a private insurer; (3) an insurance company has no fiduciary duty to renew an insurance contract; (4) Dr. Zaleski cannot demonstrate the essential elements of a claim for intentional infliction of emotional distress; and (5) Dr. Zaleski cannot demonstrate the essential elements for a claim of negligent infliction of emotional distress.

Denials of motions for summary judgment and judgment on the pleadings are non-appealable at the time of the rulings. *See Wilfong,* 156 W. Va. at 759, 197 S.E.2d 96 (1973) ("By logic, reason, the overwhelming weight of authority, and the principle of stare decisis, we hold that the effect of the entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial, is merely interlocutory and not then directly appealable to this Court."). Ordinarily, the Court "will not entertain nor discuss a denial of a motion for failure to state a claim" under Rule 12(b)(6) because of the order's interlocutory nature. *Hutchison v. City of Huntington,* 198 W. Va. 139, 147, 479 S.E.2d 649 (1996). If, however, the Court should decide to entertain the Mutual's petition for appeal on the Circuit Court's denial of its motion to dismiss and denial of its motion for summary judgment, the Court should find that the Circuit Court's denials were proper.

The purpose of a Rule 12(b)(6) motion to dismiss is to test the formal sufficiency of a complaint. *See, e.g., Collia v. McJunkin,* 178 W. Va. 158, 159, 358 S.E.2d 242, *cert. denied* 484 U.S. 944 (1987). A plaintiff need only overcome a slight burden to prevail on a Rule 12(b)(6)

motion to dismiss. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157 (1978) ("The standard which [a] plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one."). West Virginia favors deciding cases on their merits. *See Estate of Robinson v. Randolph County Comm.*, 209 W. Va. 505, 514, 549 S.E.2d 699 (2001). Consequently, the "motion to dismiss for failure to state a claim should be viewed with disfavor and *rarely* granted." *Kessel v. Leavitt*, 204 W. Va. 95, 119, 511 S.E.2d 770 (1998) (emphasis added).

A trial court should only grant a 12 (b)(6) motion when it appears beyond a shadow of doubt "that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n*, 190 W. Va. 214, 219, 438 S.E.2d 6 (1993); *see also Sticklen v. Kittle*, 168 W. Va. 147, 167-68, 287 S.E.2d 148 (1981) (ruling that a "complaint alleging that a school superintendent and a board of education acted in an arbitrary and capricious manner . . . was sufficient to state a cause of action"). This rule is true regardless of how "inartfully" the complaint is pled. *Norris v. Detrick*, 918 F. Supp. 977, 981 (N.D.W. Va. 1996), *aff'd*, 108 F.3d 1373 (4th Cir. 1997).

The Circuit Court did not reach the substance of these arguments. Instead, the Circuit Court determined that the Mutual's status as a private, public or quasi-public entity was a question of law which had to be determined before any other issues could be considered. (Tr. of August 5, 2005 H'rg, at 5). Judge Recht recognized that "if in fact there is any public status at all, in some fashion," then certain procedural due process standards might be applicable. He felt that the answer to Physicians' Mutual's status would be in W. VA. CODE §§ 33-20-1 *et seq.* and, therefore, asked the parties to look within the "four corners of the statute" to provide him with indicia of the private or public status of

the insurance company. (Tr. of August 5, 2005 Hr'g, at 5). Accordingly, review of the merits of all of the individual counts in Dr. Zaleski's Complaint is not ripe at this time and should not be considered on appeal.[7]

C. Dr. Zaleski's Complaint Sufficiently Met the Requirements of Rule 8, West Virginia Rules of Civil Procedure.

The Mutual contends that Dr. Zaleski failed to allege in his Complaint that it was a state actor and failed to request injunctive relief in his Complaint; thus, the Mutual asserts, the Circuit Court erred by granting Dr. Zaleski's motion for summary judgment and by imposing injunctive relief. The Circuit Court's actions in this case, however, were proper because: (1) Dr. Zaleski's Complaint alleges causes of action only assertable against state actors (a point which the Mutual itself argued in its response to Dr. Zaleski's Complaint), (2) the Mutual placed its own status as a state actor in question; and (3) the Mutual consented to have its status as a state actor adjudicated.

1. Dr. Zaleski's Complaint Alleges Counts That Are Only Applicable under the Theory That the Mutual Is a State Actor, and Thus, Gave Sufficient Notice to the Mutual That its Status as a Private or Public Entity Was at Issue.

West Virginia is a notice pleading state and only requires that a pleading consist of "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." W. VA. R. CIV. P. 8(a). "All pleadings shall be so construed as to do substantial justice." W. VA. R. CIV. P. 8(f). The West Virginia Rules of Civil Procedure are "designed to expedite and simplify the trial of an action." *Skeen v. C & G Corp.*, 155 W. Va. 547, 556, 185 S.E.2d 493 (1971). A "complaint must be intelligibly sufficient for a circuit

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[7]The Complaint asserts four counts against the Mutual, namely, (1) Breach of Good Faith and Fair Dealing, (2) Arbitrary and Capricious Conduct, (3) Breach of Fiduciary Duty and (4) Intentional and Negligent Infliction of Emotional Distress. (Compl. ¶¶ 15-34).

court or an opposing party to understand whether a valid claim is alleged and, if so, what it is." *Harrison v. Davis*, 197 W. Va. 651, 664, 478 S.E.2d 104 (1996).

Dr. Zaleski filed suit on April 4, 2005, against the Mutual in the Circuit Court of Ohio County asserting causes of action for, inter alia, arbitrary and capricious conduct in depriving him of his medical malpractice insurance. The Mutual itself argued that the count against it for arbitrary and capricious conduct should be dismissed because it was a private entity (not a state actor, against which such causes of action are viable). (Pet. for App. at 16-17). Also, within the Complaint, Dr. Zaleski prayed for both monetary relief and any other relief that the Circuit Court deemed appropriate. This Complaint meets the requirements of Rule 8 with its prayer of relief for causes of action that were "intelligibly sufficient for a circuit court . . . [and] the opposing party to understand whether a valid claim . . . [was] alleged and . . . what it . . .[was]." *Harrison*, 197 W. Va. at 664. As demonstrated by its own pleadings, the Mutual was fairly apprised that Dr. Zaleski was asserting that the Mutual is a state actor and that non-monetary relief may be imposed by the Circuit Court. *See, e.g., Kessel v. Monongalia Gen. Hosp.*, 215 W. Va. 609, 617-18, 600 S.E.2d 321 (2004), (finding that in West Virginia, a physician can only recover under a theory of arbitrary and capricious conduct, if the defendant is a state actor); *Sticklen*, 168 W. Va. at 167-68, 287 S.E.2d 148 (ruling that a complaint was sufficient to state a cause of action when the plaintiff alleged that a school superintendent and a board of education acted in an arbitrary and capricious manner).

2. The Mutual Placed the Status of its Private Nature in Dispute When it Affirmatively Raised the Defense to Dr. Zaleski's Count of Arbitrary and Capricious Conduct.

On April 4, 2005, Dr. Zaleski filed his Complaint against the Mutual. On June 1, 2005, the Mutual filed a motion to either dismiss the Complaint or for summary judgment on the grounds that

it did not have any duty to renew Dr. Zaleski's insurance policy. In its motions, the Mutual specifically responded that even if its decision to not renew Dr. Zaleski's policy were done in an arbitrary and capricious manner, "West Virginia law does not recognize an independent cause of action for arbitrary and capricious conduct on behalf of *private* entities." (Mem. in Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 12) (emphasis added).

With this response, the Mutual not only demonstrated that it perceived the theory of state action within Dr. Zaleski's Complaint, but also raised this issue in the context of what may fairly be considered an affirmative defense. As such, it ought not be permitted, after the occurrence of hearings and discovery on this issue, to allege that the Circuit Court improperly considered and made an unfavorable ruling on the Mutual's status as a "quasi-public" entity for purposes of procedural due process.

Lastly, the United States Supreme Court has found it appropriate for an appeals court to consider an argument that an entity is public, *even* when the plaintiff disavowed it in the lower court and did not explicitly raise it until his brief to the Supreme Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (reasoning that the assertion of state action was not a new claim, but was a new argument to support his claim). Thus, regardless of whether Dr. Zaleski's Complaint specifically alleged that the Mutual was a state actor, precedent exists for the Circuit Court to have considered the Mutual's status because it was not a new claim, but was an argument to support Dr. Zaleski's arbitrary and capricious conduct/due process claim.

D. The Circuit Court Properly Granted an Injunction on the Record and No Evidentiary Hearing Was Required or Necessary.

The Mutual argues that the Circuit Court improperly denied the Mutual an evidentiary hearing when it ordered the Mutual to reinstate Dr. Zaleski's insurance policy, and that the Circuit Court improperly evaluated the prerequisites for injunctive relief. The Circuit Court's actions, however, were proper because (1) the Circuit Court had a sufficient record before it to issue an injunction, and (2) the Circuit Court properly balanced the prerequisites for injunctive relief. Further, although the Circuit Court Ordered the Mutual to provide insurance to Dr. Zaleski, it has not been offered or provided.

1. No Evidentiary Hearing on an Injunction Is Required When a Court Possesses a Sufficient Record of Uncontested Facts.

No evidentiary hearing is required under W. VA. R. CIV. P. 65 when the court possesses a sufficient record of uncontested facts. *E.g., Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) ("An evidentiary hearing is not required when the relevant facts either are not disputed or have been clearly demonstrated at prior stages of the case, or when the disputed facts are amenable to complete resolution on a paper record."); *Commerce Park at DFW Freeport v. Maridian Constr. Co.*, 729 F.2d 334, 342 (5th Cir. 1984) ("[T]he notice contemplated by Rule 65(a) mandates that where factual disputes are presented, the parties must be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted. Here, we perceive no such dispute; thus, we think that the parties were given ample opportunity to present their respective views of the legal issues involved."); *Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000) ("Kerr-McGee has requested a hearing on this issue, however, because there is no dispute as to the material facts in this case, the Court does not

require an evidentiary hearing."); *Jefferson County Bd. of Edu. v. Jefferson County Edu. Ass'n*, 183 W. Va. 15, 23-24, 393 S.E.2d 653, 661-62 (1990) (holding that the lack of an evidentiary hearing did not invalidate the court's issue of an injunction).

In this case, the Circuit Court had ample evidence before it to issue a preliminary injunction. The parties had fully briefed and argued competing motions for summary judgment and the Mutual's motion to dismiss. In fact, the Circuit Court granted Dr. Zaleski's partial motion for summary judgment on the issue of whether or not the Mutual was a state actor and whether or not the Mutual afforded Dr. Zaleski due process when it refused to renew his insurance policy.

In a discussion with counsel at the November 21, 2005 hearing, the Circuit Court acknowledged that there might be a factual dispute with regard to the actual review given to Dr. Zaleski and advised the Appellant that it could have a couple of months to develop the issue. Counsel for the Appellant responded, "Yeah, I believe, Your Honor, however we can do it, perhaps we can agree on what happened and submit it, unless you all want to talk to someone." (Tr. Nov. 21, 2005 at 16). Therefore, in its Order of December 14, 2005, following the November 21, 2005 hearing, the Circuit Court directed the parties "to attempt to stipulate to the facts in this case and, where no stipulations can be made, submit to the Court evidence for its consideration, all of which should be provided to the Court on or before December 31, 2005." (*Id.*). The Appellant did not submit any deposition or affidavit raising a question of fact with regard to the due process provided to Dr. Zaleski. Instead, the parties stipulated to the facts set forth in the April 21, 2006 Order. If the Appellant had raised contested factual issues, then it might have a basis to complain, but it made no attempt to provide such evidence to the Circuit Court through deposition or affidavit.

Thus, no genuine issues of material facts were present that would have prevented entry of Dr. Zaleski's motion for summary judgment. Therefore, a sufficient record existed on which the Circuit Court could issue a summary judgment without an evidentiary hearing.[8]

2. The Circuit Court Properly Balanced the Prerequisites for Injunctive Relief.

In determining whether to issue a preliminary injunction, courts are to balance four factors: (1) the probability that the moving party will be successful on the merits of the claim; (2) the harm to the moving party should the injunction not be issued; (3) the harm to the non-moving party should the injunction be issued; and (4) the public interest. *Jefferson County Bd. of Edu.*, 183 W. Va. at 24, 393 S.E.2d at 662.

Application of these factors to the facts presented to the Circuit Court demonstrates that no factor weighs in favor of the Mutual, and the Circuit Court's determination was proper. In brief, (1) the Circuit Court determined that no set of facts precluded an entry of summary judgment finding that the Mutual was a state actor and that the Mutual failed to afford Dr. Zaleski due process of law; thus, Dr. Zaleski prevailed on the merits of the litigation; (2) Dr. Zaleski would suffer substantial harm should the court have denied the preliminary injunction because without insurance Dr. Zaleski would not be able to engage in the private practice of orthopedic surgery; (3) the harm to the Mutual is slight, or even non-existent, because it is in the business of insuring physicians like Dr. Zaleski, and its decision to terminate his insurance policy was based on inaccurate facts and improper

[8] The Mutual sought to submit evidence of the standards and procedures used in the insurance industry in making a determination not to renew a policy of insurance. The Mutual, however, is a state-actor that has a special relationship with West Virginia physicians. It is not a private actor, and evidence of how a private insurance company makes a determination on whether or not to renew a policy of insurance is not relevant to the procedures employed by state actors.

considerations, and (4) the public interest in this State was best articulated by the Legislature in W. VA. CODE § 33-20F-2(a)(16) when it created the Mutual for the express purpose of insuring physicians like Dr. Zaleski.

Therefore, no basis exists in fact or law to overturn the Circuit Court's grant of a preliminary injunction in favor of Dr. Zaleski that required the Mutual to reinstate Dr. Zaleski's insurance policy.

E. The Circuit Court Correctly Granted Dr. Zaleski's Motion for Summary Judgment upon Finding That Dr. Zaleski Had a Protected Property Interest in the Renewal of His Insurance and the Mutual, as a State Actor,[9] Should Have Afforded Him Procedural Due Process.

Because the Mutual is a state actor[10] and Dr. Zaleski possesses a protected property interest in continued insurance with the Mutual, the Mutual cannot fail to renew his insurance without affording him due process, which did not occur.

1. The Statute Authorizing the Incorporation of the Mutual Grants a Property Interest in Continuing Insurance Coverage That Subjects the Company's Decisions to Procedural Due Process.

Dr. Zaleski has a property interest in his insurance policy with the Mutual, and in the renewal of that policy, because the Mutual is a state actor, and the Mutual has a special relationship with West Virginia physicians. Physicians reasonably expect the Mutual to provide them with insurance coverage unless some reasonable underwriting policy exists that requires denial. After all, the Legislature instructed BRIM, the Mutual's predecessor, to provide coverage to "those healthcare providers unable to obtain medical, professional, liability insurance because it is not available

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[9]To conform to the format of the Appellant's brief, counsel for Dr. Zaleski placed the arguments establishing that the Mutual is indeed a quasi-public entity in the proceeding section, *infra* section F.

[10]Actions of quasi-public bodies will receive the same due process scrutiny as afforded actions by state agencies. *See Kessel*, 215 W. Va. at 619-20, 600 S.E.2d 321 ("The quasi-public status subjects a hospital to the same responsibilities as a public hospital.").

through the voluntary insurance market from insurers licensed to transact insurance in West Virginia at rates approved by the Commissioner." W. VA. CODE § 29-12B-7(a). This mandate plainly encompasses physicians engaged in high-risk specialities, such as Dr. Zaleski, an orthopedic surgeon.

Moreover, the Legislature founded the Mutual to keep physicians in this State. *See* W. VA. CODE § 33-20F-2(a)(7). A property interest is created when a person "has a *reasonable* expectation of entitlement" from an "independent source." *Hutchison v. City of Huntington*, 198 W. Va. at 154, 479 S.E.2d 649. State law is one basis by which a person may obtain a reasonable expectation of obtaining a property interest. *Id.* Arbitrarily denying coverage without due process of law fails to accomplish that purpose. *See, e.g., Kessel*, 215 W. Va. at 612, 600 S.E.2d 321 (holding in syllabus point 9 that "A physician or surgeon is entitled to practice in the public hospitals of the State so long as he or she stays within the law and conforms to all the reasonable rules and regulations of the hospitals. He or she cannot be deprived of that privilege by rules, regulations, or acts of the hospital's governing authorities that are unreasonable, arbitrary, capricious, or discriminatory."); *Printing-Litho, Inc. v. Wilson*, 147 W. Va., 415, 427, 128 S.E.2d 449, 456 (1962) ("If the director . . . is permitted to ignore the mandate of the statute and exercise discretion arbitrarily or capriciously . . ., the mandate of the statute is defeated . . . and the statute is rendered merely directory in character, contrary to the express legislative purpose . . . .").

Judge Recht formulated the inquiry as follows:

> The question then becomes whether or not there is a property interest of an insured for continued coverage under certain circumstances, and it has become kind of a perverse way of treating the whole issue of medical malpractice by recognizing that physicians were subject to what was considered to be by the legislature an unacceptable standard by which their conduct was measured; and that West Virginians were exposed to the risk of losing medical care, competent, quality medical care, because of the tort system.

> We can debate forever the wisdom of that action, but that's not the function of this Court. It was a – determined by the legislature that there was a correlation between medical care and the tort system.
>
> So it changed the law. And you have physicians who had a history of liability that was incurred under the old system prior to the two changes [*i.e.*, in medical tort reform] and then the system is changed.
>
> You have an insurance carrier that accepts a physician such as Dr. Zaleski. He has no current loss experience under the new paradigm and, yet, they just simply say: We're not going to renew you.
>
> Why? Because of conduct that was measured under standards that the legislature determined were the reason for the medical malpractice crisis in the first place.
>
> And, that, I believe, is the reason that Dr. Zaleski has a property interest in continued or – yeah, continued coverage; and that, if there's going to be a nonrenewal, that nonrenewal must be measured by certain procedural safeguards.

(Tr. of Nov. 15, 2005 Hr'g, at 4-5).

Therefore, Dr. Zaleski has a property interest in his insurance policy, and in the renewal of that policy because (1) the Mutual accepted all liability on policies issued by the State-run BRIM program, including Dr. Zaleski's policy; (2) the Mutual was created in the mist of a healthcare crisis in this State due to the non-availability of medical liability insurance coverage; (3) the Mutual was created for the express purpose of insuring, and keeping, physicians in this State, such as Dr. Zaleski; (4) no economically viable alternative existed for Dr. Zaleski to obtain malpractice insurance as a self-employed physician; and (5) by creating the Mutual, the Legislature created a reasonable belief by the physicians in this State that they could obtain medical liability insurance and not have that policy terminated without due process of law.

2. The Mutual Did Not Afford Dr. Zaleski Due Process of Law When it Refused to Renew His Medical Liability Insurance Policy.

Because the State Legislature has granted State physicians a property interest in continuing their insurance coverage with the Mutual, and because the Mutual is a state actor, it must issue and follow specific, enumerated, fair guidelines before it decides to not renew a physician's insurance policy. *E.g.*, *Major v. Defrench*, 169 W. Va. 241, 251, 286 S.E.2d (1982) ("[D]ue process requires the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards"). As the property interests involved become greater, courts will impose more significant protections. *See North v. W. Va. Bd. of Regents*, 160 W. Va. 248, 256, 233 S.E.2d 411 (1977). Requiring a state actor to follow pre-determined standards prevents arbitrary decisions.

The Mutual argues that it met the requirements for procedural due process on the basis that (1) Dr. Zaleski was allowed to appeal the Mutual's initial determination to the Mutual itself; (2) he was allowed to present evidence to the Mutual concerning its decision not to renew his insurance policy; (3) he filed a letter with the Insurance Commissioner, who declined to take immediate action; and (4) he had the right to pursue administrative remedies before the Insurance Commissioner but chose not to do so. The Circuit Court, after reviewing the record, properly found that the procedural due process that the Mutual afforded D. Zaleski was a "sham."[11]

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[11] In this case, the Circuit Court ordered the Mutual to submit guidelines on what it believed was the appropriate procedure for affording Dr. Zaleski due process. *See, e.g., Cooper v. Gwinn*, 171 W.Va. 245, 459, 298 S.E.2d 781 (1982) (requiring the West Virginia Department of Corrections to submit a plan to the circuit court to address the education, rehabilitation and treatment of inmates, and thus, afford the inmates the constitutional guarantee of due process). The Mutual stated, however, that its current practice met or exceeded industry standards.

In fact, the Mutual did not have or utilize any underwriting guidelines; it used a "Weighted Criteria for Declination of Coverage" to determine a physician's insurability. By its own admission, the Mutual's decision not to renew Dr. Zaleski's insurance policy was "rare." (Pet. for App. at 3).

The Circuit Court's determination that the due process afforded Dr. Zaleski was a "sham" is well supported by the record. First, the Mutual sent Dr. Zaleski a short letter informing him that it was not renewing his insurance policy, which did not give any meaningful reason for its action, and which never informed Dr. Zaleski of the nature of the allegations supporting the Mutual's decision to not renew his policy. The fact that the Mutual did not detail its reasons for not renewing Dr. Zaleski's insurance policy before the brief hearing that it afforded him violates Dr. Zaleski's due process rights because he was never adequately informed of the allegations against him. *See, e.g.*, *Major*, 169 W. Va. at 242-52 (finding a violation of due process where a police department terminated an employee after issuing a simple letter to her that her work proved "unacceptable;" the plaintiff's property interest in her employment mandated that she be given notice of the allegations against her). As a result, Dr. Zaleski was unable to adequately prepare for the hearing because he did not know what allegations supported the Mutual's decision.

Second, the Mutual never informed Dr. Zaleski of his right to have counsel present at the hearing, inspect any documentary evidence that the Mutual might have, examine witnesses and present relevant evidence, have subpoenas issued to compel attendance of witnesses and production of evidence, or of his right to have a stenographic record prepared of the proceeding at his expense.

Third, after the hearing, the Mutual summarily informed Dr. Zaleski of its decision; it never provided Dr. Zaleski with any written notice of a right to appeal its decision, nor a detailed explanation for its decision – even after Dr. Zaleski had specifically requested that explanation.

Fourth, Dr. Zaleski's only recourse against the Mutual after it made its decision to not renew his insurance policy was to litigate his due process rights. Filing a lawsuit after the Mutual acts to Dr. Zaleski's detriment cannot constitute due process. Indeed, only after the lawsuit against the Mutual was filed did Dr. Zaleski learn that the Mutual was basing its decision to not renew his insurance policy due to his prior claims history *and* "other factors including prior alcohol and/or chemical dependancy." (Apr. 27, 2006 Order, ¶ 22, at 5). The reasons used by the Mutual to support its decision are without merit.

The Mutual's consideration of Dr. Zaleski's "prior alcohol and/or chemical dependency" was improper for two reasons: it violated the West Virginia Human Rights Act, W. VA. CODE § 5-11-9(1) *et seq.*, and it concerned events well over twenty years old for which Dr. Zaleski had long since recovered. The fact that the Mutual would use a twenty-year-old, former disability as a basis for refusing to renew Dr. Zaleski's policy is unreasonable, arbitrary, capricious, and discriminatory.

In addition, the other stated reason for the Mutual's decision not to renew Dr. Zaleski's policy – "the frequency of claims" – was based upon the condition of the medical malpractice tort system during a period of time in which the Legislature deemed it to be broken and in need of substantial reform. Further, had the Mutual afforded Dr. Zaleski procedural due process, it would have recognized that Dr. Zaleski's *current* claims history, *i.e.*, those claims incurred after the medical malpractice tort reform, was not significant. Of the six cases pending against Dr. Zaleski during the last ten years, four were dismissed, a nominal settlement of $10,000 was paid in the fifth case, and the sixth case, filed in 2001, was pending at the time of the appeal hearing.

In addition to the above lawsuits, a patient of Dr. Zaleski's had filed a notice of a claim against him at the time the Mutual was determining whether or not to renew his insurance policy.[12] Although the sixty-day period for filing a screening certificate of merit had expired prior to the appeals hearing, Dr. Zaleski believes that the Mutual relied on this fact in deciding not to renew Dr. Zaleski's policy because the Mutual included *all* claims in its renewal analysis, even if the defendant physician actually wins the case.[13]

Judge Recht understood that the Mutual was inappropriately relying upon prior claims filed against Dr. Zaleski. He opined:

> Dr. Zaleski was previously covered by the Board of Risk and Insurance Management, and was then considered an acceptable risk of coverage by Physicians Mutual Insurance Company. Accordingly, as long as Dr. Zaleski's **current** loss experience, or **current** professional training and capabilities are not implicated he should not represent an unacceptable risk of coverage so that continued coverage could be a reasonable expectation. The record does not demonstrate any current loss experience or current lack of professional training or capability, accordingly this court finds that Dr. Zaleski does have a proper (sic) interest in the continued coverage under the policy issued by the Physicians Mutual Insurance Company as that term is defined in Syllabus Point 6 of State ex rel Anstey v. Davis, supra.

(Mem. of Op. and Order, Sept. 22, 2005, at 8) (emphasis in original).

Accordingly, Dr. Zaleski's case presents a quintessential example of where a court should apply procedural due process to avoid the potential for arbitrary state action.

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[12]The notice of claim is now over two years old and no further action was ever taken by the claimant.

[13] "All claims regardless of indemnity payment have an impact on the insurability of a physician. Claims must be investigated, lawsuits must be defended and defense costs are incurred whether or not an indemnity payment is made; therefore, indemnity plus expenses are considered in the insurability decision." Defendant's Answer to Interrogatory No. 24.

F. The Circuit Court Correctly Concluded That the Mutual Is a Quasi-public Entity and Is, Thus, a State Actor for Purposes of Due Process Analysis.

The Circuit Court heard arguments and thoroughly examined the Physicians' Mutual Insurance Act to determine whether, for purposes of this case, the Mutual should be considered a private or state actor. Upon reviewing and synthesizing this information, the Circuit Court correctly made the following determinations:

W. VA. CODE § 33-20F-2 clearly establishes the dynamic of a State Action because

1. There is a recognized substantial public interest in providing access to quality health care to the citizens of West Virginia;

2. There is a recognition that persons who suffer injuries as a result of medical professional liability must be adequately compensated;

3. Access to quality health care is inextricably entwined with affording the physicians the opportunity to obtain medical liability insurance;

4. The State of West Virginia attempted to alleviate the current medical liability crisis by providing medical liability coverage through an exclusively State-run program (Board of Risk and Insurance Management);

5. The state-run program represented a substantial actual and potential liability to the state which could be addressed by transferring this actual and potential liability to the private sector and creating a stable self-sufficient entity which will be a source of liability insurance coverage for physicians in this state and consequently achieving substantial public benefit; and

6. The citizens of the State of West Virginia will greatly benefit from the formation of a Physician's Mutual Insurance Company, justifying the efforts of the State of West Virginia to encourage and support the formation of a private sector entity, including

> providing a low-interest loan for a portion of the private entity's initial capital.

(Mem. of Op. and Order, Sept. 22, 2005, at 5-6) (citations omitted).

Furthermore, the Circuit Court found that these "various provisions of the Physicians' Mutual Insurance Act clearly establish a close nexus between the State of West Virginia and . . . [the Mutual] by which the goals of the State of West Virginia to protect the health, safety[,] and welfare of its citizens are 'pervasively entwined' with the means of implementing those goals through a private insurance entity, without subjecting the State of West Virginia to substantial[,] actual[,] and potential liability." (*Id.*).

The Mutual asserts that the Circuit Court's ruling is contrary to the "*Blum* trilogy" for determining if state action exists on the grounds that the Mutual does not exercise a State power, the Mutual has the power to decline or renew policies without interference from the State, and the State does not exercise any special control over the Mutual's decision not to renew a policy. In sum, the Mutual contends, it is just like any other private insurance company. For the following reasons, the Circuit Court correctly found that the Mutual is a "quasi-public" entity, and consequently, that it owed Dr. Zaleski procedural due process of law.

1. The Mutual Is a State Actor for Purposes of Constitutional Scrutiny.

The Mutual is a state actor that must afford its policy holders procedural due process of law. *See NCAA v. Tarkanian*, 488 U.S. 179, 190-91 (1988) (distinguishing state action subject to due process analysis and private conduct not covered). This Court observed in *Queen v. W. Va. Univ. Hosp., Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987):

> It is not necessary to be a political subdivision of the state, a state agency, or a purely public corporation to be found to be a state actor

> for due process purposes. All that is necessary to determine if an entity is a state actor for due process purposes *is to evaluate the nature and extent of state involvement so as to determine if its actions are fairly attributable to the state.*

179 W. Va. at 103 (citations omitted) (emphasis added) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L.Ed. 2d 45 (1961)). Although the statute creating the Mutual classifies it as a private entity, W. VA. CODE § 33-20F-4(a), it remains an arm of the government for purposes of due process. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383-92 (1995) (finding Amtrak a government agency for constitutional purposes, despite an incorporating statute making it a private, for-profit company).

This Court has enunciated several factors in determining whether an entity is a state actor: (1) did the Legislature create the organization, *see Woodford v. Glenville State Coll. Corp.*, 159 W. Va. 442, 445-46, 225 S.E.2d 671 (1976) (calling this the "preeminent factor"); and (2) does the organization operate statewide, perform work for the state, depend on the state for its funding, or is the organization subject to local control. *Ohio Valley Contractors v. Bd. of Educ.*, 170 W. Va. 240, 241, 293 S.E.2d 437 (1982). Another factor considered by this Court is whether the entity's governing board's composition is prescribed by the legislature. Syl. pt. 1, in part, *Blower v. W. Va. Educ. Broad. Auth.*, 182 W.Va. 528, 389 S.E.2d 739 (1990). A court should consider these factors in light of "the statute which created it and the functions performed by it under said statute." *Hesse v. State Soil Conservation Comm.*, 153 W. Va. 111, 115, 168 S.E.2d 293 (1969).

Application of these standards demonstrates that the Mutual is a state actor under the West Virginia Constitution. The West Virginia Legislature created the Mutual, W. VA. CODE § 33-20F-4(a), which satisfies the "preeminent factor" identified in *Woodford*, 159 W. Va. at 445-46. The

Mutual operates state-wide for the purpose of alleviating this State's medical malpractice liability crisis. W. VA. CODE §§ 33-20F-2(a)(1) and 33-20F-9(e). It obtained its initial infusion of capital from a low interest loan provided by the State, § 33-20F-2(a)(16), and by a $1,000 tax levied on West Virginia physicians. § 33-20F-7(e). In addition, civil penalties existed for those physicians who failed to pay the Mutual this assessment and the mandatory suspension of their licenses. *Id.* No private entity can tax citizens of this State or deprive them of their ability to earn a living.

Furthermore, the legislature has predetermined the constituents of the Mutual's Board of Directors: there are eleven directors, five of whom must be West Virginia licensed physicians, and the sixth must rotate between the dean of the West Virginia School of Medicine, the dean of the Marshall University School of Medicine, and the dean of the West Virginia School of Osteopathic Medicine. § 33-20F-5(b). While it may be noted that the authorizing statute provides that the Mutual's funds will not co-mingle with State treasury funds, § 33-20F-4(c), the Mutual meets such a large number of important factors courts use to determine if an organization is a government entity that this Court should consider it a state actor for purposes of affording its policy holders procedural due process.

While no West Virginia precedent exists on whether the Mutual should be treated as a state actor, a Florida appellate court found that a physicians' practice group, created by the government as a non-profit corporation, had governmental status. *See Pagan v. Sarasota County Public Hosp.*, 884 So. 2d 257 (Fla. Dist. Ct. App. 2004). That case involved a government-created hospital board that had incorporated a physicians' group. *Id.* at 258-59. Physicians in the group agreed to only treat group patients. *Id.* at 263. The hospital board, a government entity, had created the physicians'

group. *Id.* It also noted that the group received its initial supply of funding from the state and continued to receive funding, and the hospital board controlled the company's board of directors. *Id.*

The similarities between *Pagan* and this case are evident: the Mutual was founded by the legislature; the Mutual received working capital from the state; and the Mutual serves West Virginia physicians, state-wide. It is disingenuous to claim that a "private" company can compel an entire group of taxpayers to provide funding for that company. Further, while the loan is outstanding, the Insurance Commissioner can waive Physicians' Mutual's premium taxes "if payment would render the company insolvent or otherwise financially impaired." § 33-20F-4(e)(1).

2. Dr. Zaleski Has a Property Interest in Continuing Insurance Coverage.

Dr. Zaleski has a property interest in his insurance policy with the Mutual, and in the renewal of that policy, because the Mutual is a state actor, and the Mutual has a special relationship with West Virginia physicians. Physicians who were compelled to subsidize the creation of the Mutual reasonably expected the Mutual to provide them with insurance coverage unless some reasonable underwriting policy existed that required denial. After all, the Legislature instructed BRIM, the Mutual's predecessor, to provide coverage to "those healthcare providers unable to obtain medical, professional, liability insurance because it is not available through the voluntary insurance market from insurers licensed to transact insurance in West Virginia at rates approved by the Commissioner." W. VA. CODE § 29-12B-7(a). This mandate plainly encompasses physicians engaged in high-risk specialities, such as Dr. Zaleski's orthopedic surgery. Moreover, the Legislature founded the Mutual to keep physicians in this State. *See* § 33-20F-2(a)(7); *see also Hutchison*, 198 W. Va. at 154, 479 S.E.2d 649 (finding that state law can create a reasonable belief

in a property right). Arbitrarily denying coverage without due process of law fails to accomplish that purpose. *See supra* § E(1) at 28-30 (providing parenthetical cases in support).

In the Amicus Curiae Br. of W. Va. Ins. Comm'r, at 6, n. 3, the Commissioner argues that in 2006, when the Legislature substantially rewrote § 33-20F-9(f)(4), it deleted the "exception" that was one source upon which the Circuit Court relied when determining the Mutual's status. The language of the statute at the time Dr. Zaleski was denied renewal read:

> (f) Notwithstanding the provisions of subsection (b), (c), or (e) of this section, the company may:
>
> > (4)Except with respect to policies transferred from the Board of Risk and Insurance Management under this section, refuse to provide insurance coverage for individual physicians whose prior loss experience or current professional training and capability are such that the physician represents an unacceptable risk of loss if coverage is provided.[14]

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[14] The current statute reads:

> (f) Notwithstanding the provisions of subsection (b), (c), or (e) of this section, the company may:
>
> (4) Refuse to provide insurance coverage for individual physicians who do not meet underwriting criteria established by the company, from time to time, which underwriting criteria may take into account factors considered by other medical malpractice insurance companies, from time to time, in underwriting or declining to underwrite similar risks and which factors may include, but are not limited to, prior loss experience, current professional training and capability, disciplinary action taken against the physician by the Board of Medicine or Board of Osteopathy; felonies or other criminal offences committed by the physician; evidence of alcohol or chemical dependancy or abuse; evidence of sexual misconduct; and other factors relevant to the liability risk profile of the physician and which do or may indicate that the physician represents an unacceptable risk of loss if coverage is provided.

As a general rule of statutory construction, the West Virginia Legislature has stated that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." § W. VA. CODE § 2-2-10(bb); *see also Findley v. State Farm Mut. Automobile Ins. Co.*, 213 W. Va. 80, 92, 576 S.E.2d 807 (2002) ("'The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.'") (citation omitted). Thus, this amendment does not have a retroactive effect.[15]

Although this section of the statute was considered when determining the status of the Mutual, many other factors were also considered. For the sake of argument, however, if the Commissioner is correct that this would have unduly affected the Circuit Court's decision, then this only further disproves the Mutual's argument that this case would have a catastrophic effect because the Circuit Court's decision would be strictly limited to cases that arose prior to the 2006 amendment.

Arguably, the statute creating the Mutual provides for its gradual evolution from a corporation with more "public" characteristics to one with more "private" characteristics. For purposes of Dr. Zaleski's case, one cannot look at what the Mutual may become eventually, but rather what it was at the time of the events relating to Dr. Zaleski's non-renewal. Because the statutes and circumstances surrounding the creation of the Mutual also create a property interest for physicians, like Dr. Zaleski, the Mutual is a state actor. If the public policy which led to the creation

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[15]Interestingly, the "exception" in the former statute which the Mutual argues should have no effect, was specifically added pursuant to a 2003 amendment.

of the Mutual, its initial funding and the composition of the board of directors are considered, then the Mutual is a quasi-public agency or "state actor."

3. Public Policy Supports the Contention That Physicians' Mutual Is a Quasi-public Agency.

In W. VA. CODE § 33-20F-2, the Legislature articulated substantial public policy concerns which led to the creation of the Mutual. Included was the unavailability or lack of affordability of medical liability insurance which may result in physicians leaving the State which then would result in a lack of access to medical care by the public. § 33-20F-2(a)(5-8). The other significant consideration was to ensure that individuals who had suffered "injuries as a result of medical professional liability" would have the ability to obtain compensation. § 33-20F-2(b)(2). While providing insurance may not be a traditional responsibility of the State, the Legislature recognized that insurance companies in the private sector were not addressing the significant needs of the citizens of West Virginia and its physicians; therefore, the State proposed a solution through legislative enactment.

4. The Start-up Capital of the Mutual Was Supplied Through Public Monies.

An analysis of the Mutual's incorporation supports the contention that the Mutual is a quasi-public agency. Although like the hospital in *Kessel v. Monongalia Gen. Hosp., supra*, it has private incorporation under W. VA. CODE § 33-20F-4(a), the company also has many public characteristics. For instance, like the hospital in *Kessel*, the Mutual, at least initially, will depend on the State for its funding. To enable the creation of the Mutual, "the company may be eligible for funds from the Legislature." § 33-20F-4(a). More particularly, a special revenue account was established to receive

"moneys transferred from the West Virginia Tobacco Medical Trust Fund . . . . for the company's use as initial capital and surplus." § 33-20F-7(a).

In addition to this, on July 1, 2003, a "special one-time assessment" of $1,000 was imposed, with some exemptions, on *all* physicians licensed by either the board of medicine or the board of osteopathy "for the privilege of practicing medicine in this state." § 33-20F-7(b). Not only were physicians compelled by the State to fund the Mutual, if they did not contribute, the State could impose a civil penalty of $250 and the licensing board was directed to suspend the physician's license. § 33-20F-7(e).

Only those physicians licensed by the State on July 1, 2003, were subject to this requirement. Other physicians are required to pay $1,000, *if* they apply for coverage with the Mutual. This requirement expires on January 1, 2008. This compelled funding and possible disciplinary action abundantly indicate the close nexus between the State and the Mutual. It is difficult to imagine any purely private company having the ability to compel an entire segment of the population to contribute to its start up capital and to subject those who do not contribute to civil penalties. Also included in the Mutual's start-up capital were funds obtained from BRIM "attributable to premiums paid for the insurance obligations transferred to the company" which would include the premiums that Dr. Zaleski paid for three years. W. VA. CODE § 33-20F-9(b)(3).

The Mutual will also receive assistance from other malpractice insurers. It appears that premium taxes paid by the Mutual "and by *any insurer* on its medical malpractice line . . . shall be temporarily applied toward replenishing the moneys appropriated from the West Virginia Tobacco Settlement Medical Trust Fund . . . pending repayment of the loan of such moneys by the company."

§ 33-20F-4(e)(2) (emphasis added). While not a source of direct funding, this compels other "private" insurers to help pay back the Mutual's loan.

There are certain restrictions placed on the Mutual that would not be imposed on a purely private company. It cannot "declare any dividend to its policyholders; sell, assign or transfer substantial assets of the company; or write coverage outside of this state, except for counties adjoining this state, until after any and all debts owed by the company to the state have been fully paid." § 33-20F-4(a).

Finally, the Insurance Commissioner is also given the ability, while the loan is being repaid, to waive certain taxes if payment of the taxes would financially impair the Mutual.

Accordingly, the Circuit Court properly found that a close nexus exists between the State and the Mutual, making the Mutual a "quasi-public" entity for due process purposes because (1) the Legislature expressly created the Mutual to address the health care crisis created by abusive tort law, and thus, is exercising a state power; (2) the Mutual's power is curtailed by the State, at least for a period, and its governing body was proscribed by the State; and (3) State funds were used to aid its inception to ensure the Mutual could accomplish the goals of the State to protect the health, safety and welfare of its citizens, without subjecting the State to substantial, actual, and potential liability.

VII. RELIEF REQUESTED

For the abovementioned reasons, Dr. Zaleski respectfully requests that this Court affirm the Circuit Court's decision that (1) it possessed subject matter jurisdiction, (2) the Mutual is a quasi-public entity, (3) the Mutual owed Dr. Zaleski due process when it failed to renew his policy, and (4) what process the Mutual afforded Dr. Zaleski was woefully inadequate.

Furthermore, Dr. Zaleski requests that this Court affirm the Circuit Court's finding that Dr. Zaleski's Complaint was sufficiently pled to support both a due process claim and the subsequent request for injunctive relief and agree that no evidentiary hearing was required for said relief because the uncontested record was sufficient to support the Circuit Court's granting of injunctive relief. Upon such affirmation, Dr. Zaleski further requests that this Court order the Mutual to comply with the injunctive order and reinstate Dr. Zaleski's insurance policy.

However, should this Court determine otherwise, in the alternative, Dr. Zaleski respectfully requests that this Court remand this case to the Circuit Court (1) to amend the Complaint if this Court should find that the Circuit Court erred in its determination that Dr. Zaleski's Complaint was not sufficiently pled to include a due process claim and/or equitable relief; (2) to judge the merits of all counts within the Complaint; and (3) for a determination of whether Dr. Zaleski suffered any damages by the Mutual's actions, and if so, to what extent.

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CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF ON BEHALF OF APPELLEE ROBERT J. ZALESKI, M.D.**, was made upon the Appellant, West Virginia Physicians' Mutual Insurance Company, and upon the Amicus Curiae, the West Virginia Insurance Commissioner, by mailing a true copy thereof to the following below-named counsel this 31st day of January, 2007:

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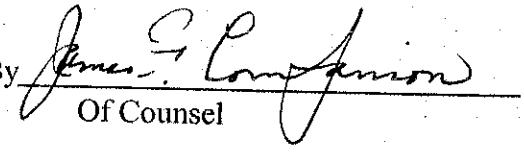
By 
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